**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **FRANK E. FUKSA, JR.**<br>Claimant<br>VS.<br><br>**HARRISON COMPANY**<br>Respondent<br>AND<br><br>**FIREMAN'S FUND INSURANCE COMPANY**<br>Insurance Carrier | ) | Docket No. 270,473 |
| **FRANK E. FUKSA, JR.**<br>Claimant<br>VS.<br><br>**METRO XPRESS**<br>Respondent<br>AND<br><br>**AMERICAN INTERSTATE INSURANCE COMPANY**<br>Insurance Carrier | ) | Docket No. 1,013,627 |

## ORDER

Harrison Company and its insurance carrier appealed the January 8, 2004 Order entered by Administrative Law Judge John D. Clark. The Board placed the claim against Harrison Company for post-award medical treatment on its summary calendar for disposition without oral argument.

### APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. Steven J. Quinn of Kansas City, Missouri, appeared for Harrison Company and its insurance carrier. Terry J. Torline of Wichita, Kansas, appeared for Metro Xpress and its insurance carrier.

## RECORD AND STIPULATIONS

The transcript of the January 8, 2004 hearing before Judge Clark, and the attached exhibits, comprise the record for this appeal.

## ISSUES

Docket No. 270,473 deals with an August 21, 2001 accident and resulting back injury while claimant was employed by Harrison Company. In August 2002, claimant partially settled that claim, retaining his rights both to review and modify the award and to seek additional medical treatment. Docket No. 1,013,627 deals with an alleged series of accidents from September 2003 and each and every working day afterwards through October 24, 2003, and resulting back injury or aggravation of a preexisting back injury.

Claimant now contends he needs additional medical treatment for his back either as the result of ongoing symptoms from the August 2001 accident while working for Harrison Company or as the result of a new injury or aggravation of his preexisting back condition while working for Metro Xpress. Accordingly, the January 8, 2004 hearing before Judge Clark was a post-award medical hearing for Harrison Company but only a preliminary hearing for Metro Xpress.

In the January 8, 2004 Order, Judge Clark ordered Harrison Company to provide claimant with medical treatment after finding the medical records indicated claimant's present problems were related to the injury that he sustained while working for that employer. The Judge wrote, in part:

> Steven R. Hughes, D.O., relates the Claimant's present problems to a previous injury and are not related to his employment with his present company [Metro Xpress]. All benefits are assessed against Harrison Company under Docket No. 270,473.[1]

Harrison Company and its insurance carrier contend Judge Clark erred. They argue claimant recovered from his August 2001 accident and was able to drive a truck symptom-free for two other employers before he began working for Metro Xpress where his back symptoms recurred. They argue claimant's present problems and, therefore, his present need for medical treatment are directly related to the driving that he has performed for his current employer, Metro Xpress. Accordingly, Harrison Company and its insurance carrier request the Board to modify the January 8, 2004 Order and find Metro Xpress and its insurance carrier responsible for claimant's medical treatment.

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[1] ALJ Order (Jan. 8, 2004).

Conversely, Metro Xpress and its insurance carrier argue the medical evidence presented to date indicates claimant has chronic low back symptoms that never resolved following the August 2001 accident. They acknowledge claimant's testimony at the January 8, 2004 hearing regarding his back symptoms was inconsistent with the history contained in the medical notes introduced at the hearing. But they contend the Judge had the opportunity to observe claimant at the hearing and, therefore, determine which history was true. Consequently, they argue the Board should affirm the Judge's finding that claimant's present problems are due to the accident claimant sustained while working for Harrison Company.

Claimant, in his brief to this Board, does not argue which employer should be held responsible for the requested benefits but, instead, only requests the appropriate employer be identified and held responsible for the benefits requested.

The only issue before the Board on this appeal is whether claimant's present low back symptoms are due to the August 2001 accident while he was working for Harrison Company or whether they are due to either an injury or aggravation that claimant sustained while working for his present employer, Metro Xpress.

## FINDINGS OF FACT

After reviewing the record compiled to date, the Board finds:

1. On August 21, 2001, claimant injured his low back while working for Harrison Company as a route delivery driver. Claimant initiated a workers compensation claim for that accident and on August 1, 2002, entered into a settlement agreement with Harrison Company and its insurance carrier. The settlement preserved claimant's rights both to review and modify the award and to pursue future medical treatment, as needed.

2. At the recent January 8, 2004 hearing, the parties introduced the August 1, 2002 settlement hearing transcript and Dr. Frederick R. Smith's December 14, 2001 medical report that was attached. According to that medical report, which was prepared for purposes of the claim filed for the August 2001 accident, Dr. Smith diagnosed lumbar strain and sprain and rated claimant as having a five percent whole body functional impairment under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The doctor also commented on work restrictions, as follows:

> In regard to work restrictions I feel the restrictions outlined by Dr. Parman appear to be adequate with no lifting ever over 70 pounds and any occasional lifting would be around 50 pounds and then only with good technique. He probably would also need to continue

> wearing his back support. Prolonged sitting such as long truck driving may be a problem, but hopefully he could do a good deal of stretching before leaving on the trips and every two hours or so be able to get out of the truck and do some stretching.[2]

3. Claimant did not return to work for Harrison Company after the August 2001 accident. According to claimant, that job required more unloading than driving. Moreover, claimant believed that job violated his work restrictions.

4. In July 2003, claimant began working for his current employer, Metro Xpress, as a truck driver, which required him to drive up to three hours at a time without a break. Claimant drives from 2,000 to 3,000 miles per week in trips from 300 to 1,500 miles one way. According to claimant, once he began driving for Metro Xpress, he began experiencing problems with his back. Claimant testified, in part:

> I started driving for them [Metro Xpress] and my back just started hurting real bad, and I was having real bad back spasms. And I went to Wichita Clinic because I thought I was having a heart attack, and they said it wasn't that. They gave me an EKG and said it wasn't my heart. It was just muscle spasms, and sometimes they feel that bad. And so they said it was probably with my work. So I went and told my work, and then they told me to go to this doctor and get checked out.[3]

Claimant attributes his present low back symptoms to the sitting and bouncing he encounters while driving for Metro Xpress.

5. Between working for Harrison Company and Metro Xpress, claimant worked as an over-the-road driver for two companies which he identified as Hamilton and Central. While working for those companies, claimant did not experience back problems. Claimant testified, in part:

> The first one I worked for Hamilton I didn't have any problems with, but I only drove three or four days a week and I was off for three days. And I didn't have hardly anything. I mean nothing, you know. And then I went to Central, and didn't have any there. Just when I -- when I started working for Metro I just -- it just started back up again, started hurting.[4]

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[2] P.H. and P.A.H. Trans., Resp. Ex. 2.

[3] P.H. and P.A.H. Trans. at 7.

[4] *Id.* at 17-18.

Claimant believes he was symptom-free before he began working for Metro Xpress.

6. After claimant reported his symptoms to Metro Xpress, the company referred him to Via Christi Occupational & Environmental Medicine. On October 29, 2003, claimant prepared paperwork for that clinic in which he stated bumping, bouncing and sitting in one spot had aggravated a previous back injury. Other clinic notes from that same date indicate claimant told clinic personnel he had originally hurt his back while working for Harrison Company in August 2001 when a load of Gatorade fell on him but he had begun experiencing pain and spasms in his low to mid back commencing in September from bouncing while driving for Metro Xpress.

7. On October 29, 2003, claimant saw Dr. Steven R. Hughes at the clinic. In addition to the notes mentioned above, Dr. Hughes prepared notes from claimant's visit. Dr. Hughes' notes indicate claimant was seen for chronic ongoing back problems. The doctor's October 29, 2003 notes read, in part:

> The patient is here for initial evaluation of **chronic ongoing back problems.** He apparently hurt his back in August working or *[sic]* one company when some gatorade or some boxes fell and he fell backwards apparently. It is difficult to ascertain the exact mechanism of injury. He didn't actually land on the ground but he complained of back pain at that time. He apparently saw doctors who did regular x-rays, CT or MRI and they were all reported as normal. He did physical therapy and it did seem to get better and then he apparently quit for whatever reason and went to another company to drive and **when he drives a truck the bouncing up and down really makes the back pain worse. The back pain had never resolved from the previous injury** and he was already on a 75 pound restriction apparently from the doctors for that injury. He says the **driving makes it moderately worse particularly when he is driving 10-15 hours a day**. . . .
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> . . . .
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> He states that the **driving really aggravates it with the bouncing up and down** it just gets worse so at this time until we can further evaluate we will take him off the driving. . . .[5] (Emphasis added.)

As a result of the October 29, 2003 evaluation, Dr. Hughes diagnosed claimant with chronic back pain.

[5] See P.H. and P.A.H. Trans., Cl. Ex. 1.

8. On November 26, 2003, claimant returned to the clinic and again saw Dr. Hughes. The doctor's notes from that office visit indicate the doctor concluded claimant had chronic back pain from an earlier injury. Pertinent portions of the doctor's notes from that visit read:

> **Chronic back pain, preexisting from a previous injury it should not be related to his employment with his present company.** He just started a short time ago. He just drives he does not load or unload. He has had no specific injuries. Just sitting in the truck seems to make his back hurt more.
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> . . . **His pain appears to be more related to his previous problem that has been ongoing for a long period of time.** I think he needs to get back to the other people for his ongoing care or whatever his attorney wants him to do. . . .[6] (Emphasis added.)

## CONCLUSIONS OF LAW

There is little question claimant's August 2001 back injury plays an important part in his current back symptoms. The evidence, however, establishes it is more probably true than not that claimant's present back symptoms were caused by the relatively long periods of driving and the bouncing that claimant endured while driving Metro Xpress' trucks. The symptoms that claimant experienced following the August 2001 accident resolved and he was symptom-free while driving for two other employers before commencing work for Metro Xpress. Accordingly, the evidence establishes the work that he performed for Metro Xpress aggravated, at least temporarily, his back.

A preexisting injury or condition is compensable under the Workers Compensation Act even when the accident at work only serves to aggravate the preexisting condition.[7] The test is not whether the accident caused the condition but, instead, whether the accident aggravated or accelerated it.[8]

For preliminary hearing purposes, claimant has established that he either aggravated or injured his back while working for Metro Xpress. Therefore, claimant is entitled to receive workers compensation benefits from that employer and its insurance carrier. Accordingly, the January 8, 2004 Order should be modified in that respect.

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[6] *Id.*

[7] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

[8] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

As provided by the Workers Compensation Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[9]

**WHEREFORE**, the Board modifies the January 8, 2004 Order and finds Metro Xpress and its insurance carrier are responsible for providing claimant with the preliminary hearing benefits ordered by the Judge. Accordingly, preliminary hearing benefits are ordered paid in Docket No. 1,013,627 but post-award medical benefits are denied in Docket No. 270,473.

**IT IS SO ORDERED.**

Dated this ____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Steven J. Quinn, Attorney for Harrison Company and Fireman's Fund Ins. Co.
Terry J. Torline, Attorney for Metro Xpress and American Interstate Ins. Co.
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[9] K.S.A. 44-534a(a)(2).